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No. 00-1853

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

AKOS SWIERKIEWICZ,

Petitioner,

v.

SOREMA N.A.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF FOR PETITIONER

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ARGUMENT

I. THE COMPLAINT SATISFIES THE SIMPLIFIED NOTICE PLEADING STANDARD SET UP BY THE FEDERAL RULES

As it did in the courts below, Sorema N.A. ("Sorema") relies on "facts" nowhere to be found in the four corners of Mr. Swierkiewicz's pleading to support dismissal of his complaint.[1] But its reliance on those "facts," like its previous reliance on its counsel's hearsay affidavit (JA 15a *et seq.* at ¶¶ 3-5), breaches the fundamental principle that the parties and the Court are confined on a motion to dismiss to just those averments set forth in the complaint. *Scheuer v. Rhodes*, 416 U.S. 232, 249-250 (1974). Moreover, by mischaracterizing to its own advantage a number of the allegations that are specifically set out in the complaint, Sorema in effect displaces the rule that requires a pleading to be read in the light most favorable to the pleader for one that requires it to be read in the light most favorable to the party seeking dismissal. This too is improper. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

Having thus mischaracterized the complaint, Sorema then asks the Court to hold employment discrimination plaintiffs to a degree of factual specificity not otherwise required, much less contemplated, by Rule 8(a)(2) of the Federal Rules of Civil Procedure. We have previously taken up this point. *See* Pet. Br. at 10-20. But the illogic of Sorema's position is further revealed by the conclusory averments contained in the four complaints this Court sustained in *Conley, Scheuer, McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976), and *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993). Applying the simplified notice pleading principles of those cases, as well as the precedents from every other circuit court save for the Second, *see* Pet. Br. at 18-20, leads ineluctably to the conclusion that Sorema's motion to dismiss Mr. Swierkiewicz's complaint should have been denied.

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1. We use the term "complaint" to refer to both the initial and amended complaints since they each raise the same factual allegations to support Mr. Swierkiewicz's claims of national origin and age discrimination.

A. Sorema Has Mischaracterized the Allegations of the Complaint

Not once in its recitation of the facts did Sorema mention that Mr. Swierkiewicz was "demoted" in 1995 and replaced by a substantially younger French national, Nicholas Papadopoulo, who possessed none of his qualifications or experience. Nor did Sorema mention that the demotion was the act of another French national, Francois Chavel, its CEO, and the same person who fired Mr. Swierkiewicz two years later. In addition, Sorema wholly omits reference to the fact that, following Mr. Swierkiewicz's demotion, Mr. Chavel promoted and hired other employees (*e.g.*, Daniel Peed, who was much younger than Mr. Swierkiewicz, and Michel Gouze, another French national) for jobs he was more qualified to perform. Indeed, and most critically, Sorema wholly omits mention of the complaint's averment that for two years following his demotion, Mr. Chavel discriminated against Mr. Swierkiewicz on account of his national origin and age by "isolat[ing] [him], exclud[ing] [him] from business decisions and meetings and deny[ing] [him] the opportunity to reach his true potential at Sorema." JA 26a at ¶ 29.

All these averments were clearly pled in the complaint. JA 25a-26a at ¶¶ 19-29. So too were the allegations that Mr. Swierkiewicz tried unsuccessfully to resolve his grievances with Mr. Chavel, JA 26a at ¶ 30, and, finally, sent him a memo seeking a severance package to resolve his disputes with Sorema. JA 26a at ¶ 31. But this too did no good and only led to his abrupt and severance-less firing by Mr. Chavel — an act of national origin and age discrimination that stood in sharp contrast to the favorable treatment that Sorema accorded other executives (five of whom were named in the complaint) for whom it *did* have cause to terminate their employment. JA 27a at ¶ 38.

Ignoring these allegations of national origin and age discrimination will not, however, make them go away. Nor does it suffice for Sorema to mischaracterize the facts actually pled by Mr. Swierkiewicz. For example, it does not advance Sorema's cause (or the Court's standard of review) for it to say that Mr. Chavel merely "transferred" Mr. Swierkiewicz's Chief Underwriting Officer duties and assigned them to Mr. Papadopoulo (Resp. Br. at 1 and 44), when in fact the complaint says this represented a

discriminatory "demotion" based on Mr. Swierkiewicz's national origin and age (JA 25a at ¶¶ 19-20). Nor is there anything in the record to support Sorema's contention that at the time of his demotion Mr. Swierkiewicz "was given additional marketing and services responsibilities" to perform (Resp. Br. at 1). Similarly, Sorema has no basis to state that, at the time of his separation, Mr. Swierkiewicz "cleared out" all the personal belongings from his office (Resp. Br. at 2); committed "hostile" actions against it (*id.*); and, most egregious of all, that his "complaint admitted that he had precipitated his own separation from the company by sending an intemperate memorandum to the president of the company and tendering his resignation" (*id.* at 29-30).

Not one of these allegations can be found in or reasonably inferred from the complaint. The best that can be said for them is that they significantly mischaracterize what Mr. Swierkiewicz set forth in his EEOC charge (JA 20a-21a). There, rather than admitting he was responsible for his job loss, Mr. Swierkiewicz stated that Mr. Chavel accused him of committing "a hostile act against the company by clearing out my personal items from my office." JA 20a. But attributing that remark to Mr. Chavel is a far cry from an admission of wrongdoing by Mr. Swierkiewicz; quite the contrary, the charge states that Mr. Chavel fired Mr. Swierkiewicz on account of his national origin (Hungarian) and his age (51). JA 21a. The complaint says the same thing. JA 27a-29a at ¶¶ 37, 43, 45, 47 and 49. Construing it in the light most favorable to Mr. Swierkiewicz, as the Court must, *Scheuer*, 416 U.S. at 236, there can be no doubt its averments, taken as whole, more than adequately state claims for relief under both Title VII and the ADEA.[2]

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2. The *amicus curiae* Brief of the Equal Employment Advisory Council ("EEAC") advances the speculative argument that "Sorema could have had a number of lawful reasons for firing Swierkiewicz." Br. at 15. Alternatively, it goes on to say, Sorema "could have fired Swierkiewicz for no reason without violating Title VII or the ADEA." *Id.* Absent a responsive pleading from Sorema, however, there is no record support for these statements. Indeed, they are contrary to what the complaint says, *viz*, "Sorema had no valid basis to fire Mr. Swierkiewicz," JA27a at ¶ 36; rather, his "age and national origin were motivating factors in Sorema's decision to terminate his employment." *Id.* at ¶ 37. In light of those averments, the speculation of the EEAC only "underscores the danger of

B. Sorema Has Misconceived the Function and Goal of Rule 8(a)(2)

Having mischaracterized the facts that were pled by Mr. Swierkiewicz, Sorema then proceeds to argue that the complaint's allegations of national origin and age discrimination are wholly conclusory and thus legally insufficient to pass muster under Rule 8(a)(2). Some "facts" must be pled, it argues, to avoid dismissal of a federal court complaint. Of course, Sorema is wrong in asserting that Mr. Swierkiewicz did not plead sufficient facts to overcome its motion to dismiss — even under the flawed fact-pleading requirement of the Second Circuit. But more fundamentally, Sorema is mistaken because the Federal Rules eschew fact pleading and, since 1938, have opted instead for what the Court has characterized as "simplified notice pleading." *Conley*, 355 U.S. at 47 (inside quotation omitted). While Sorema is critical of the Court's use of that term, *see* Resp. Br. at 13 n.4, it is one the Court has unanimously and consistently used or applied in each of its subsequent civil rights pleading cases. *See, e.g., Scheuer*, 416 U.S. at 236 and 250 (citing *Conley* and applying notice pleading principles to reject defense efforts to dismiss the plaintiffs' complaint for lack of specificity); *McDonald*, 427 U.S. at 283 n.11 (1976) (citing *Conley* and rejecting defense efforts at dismissal based on the complaint's lack of "particularity" and emphasizing that any such assertion "too narrowly constricts the role of the pleadings"); and *Leatherman*, 507 U.S. at 168 (citing *Conley* and holding that "it is impossible to square [a] heightened pleading standard . . . with the liberal system of notice pleading set up by the Federal Rules") (inside quotations omitted).

Indeed, if Rule 8(a)(2) were held to require some measure of fact-pleading, as Sorema contends, the outcomes in those four cases would doubtless have been different. For example, in *Conley* the plaintiffs' complaint only averred "that the Union had failed *in general* to represent Negro employees equally and in good faith." 355 U.S. at 43 (emphasis added). In *Scheuer*, the complaints only "alleged *generally and in conclusory terms* that the defendants

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dismissing a discrimination case on a minimal record." *Gilligan v. JAMCO Dev. Corp.*, 108 F.3d 246, 250 (9th Cir. 1997).

conspired to call out the National Guard and were guilty of wanton, wilful and negligent conduct when they knew or should have known that there was no cause or insufficient cause therefor", *Krause v. Rhodes*, 471 F.2d 430, 433 (6th Cir. 1972) (emphasis added), *rev'd*, 416 U.S. 232 (1974). In *McDonald*, the plaintiffs made no effort to plead anything more than they were fired while similarly situated employees were not, 427 U.S. at 283 and n.11. And in *Leatherman*, a Section 1983 failure to train case, the plaintiffs' complaint "fail[ed] to state *any facts* with respect to the adequacy (or inadequacy) of the police training." *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 954 F.2d 1054, 1058 (5th Cir. 1992) (emphasis added), *rev'd*, 507 U.S. 163 (1993).

Yet, despite their general and conclusory allegations, the complaints in all four cases were sustained by the Court. That is because Rule 8(a)(2) does not require the pleading of "facts" or "causes of action," *Dioguardi v. Durning*, 139 F.2d 774, 775 (2d Cir. 1944), but rather, it only requires "a short and plain statement of the claim showing that the pleader is entitled to relief." The rest is left for discovery, summary judgment or trial. *Accord Leatherman*, 507 U.S. at 168-169 ("federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later"). *See also* Honorable Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456, 467 (1942) ("[U]nder the present scheme the pleadings are not the place to obtain particularization of the case . . . the parties are protected by discovery, pre-trial and summary judgment").

As applied here, the question thus becomes: Has Mr. Swierkiewicz provided Sorema with fair notice of his Title VII and ADEA claims and the grounds on which they rest? The answer, we submit, is yes. He is a person covered by both statutes. *See* 42 U.S.C. § 2000e(a) and (e) (Title VII) and 29 U.S.C. §§ 630(a) and 631(a) (ADEA). Sorema is an employer covered by both statutes. *See* 42 U.S.C. § 2000e(b) (Title VII) and 29 U.S.C. § 630(b) (ADEA). Mr. Swierkiewicz has the right not to be discriminated against on account of his national origin and age; correspondingly, Sorema may not discriminate against him on either ground. *See* 42 U.S.C. § 2000e-2a (Title VII) and 29 U.S.C. § 623(a) (ADEA). The at-issue employment decision, Mr. Swierkiewicz's dismissal, is

clearly an adverse action.[3] Mr. Swierkiewicz contends it was motivated by his national origin and his age (the culmination of two years of ongoing discrimination). JA 27a at ¶ 37 and JA 28a-29a at ¶¶ 43, 45, 47 and 49. He identified the person who fired him, Mr. Chavel, JA 27a at ¶ 35, the date he was fired, April 29, 1997, *id.*, and he anticipated any defense to his firing by asserting that "Sorema had no valid basis to fire [him]." *Id.* at ¶ 36. Having eliminated any lawful reason for Sorema's actions, his complaint sufficiently put Sorema on notice that he believed and intended to prove at trial that he was unlawfully fired in violation of Title VII and the ADEA. *Cf. Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978) ("when all legitimate reasons for [the adverse employment action] have been eliminated . . . it is more likely than not the employer, who we generally assume acts only with *some* reason, based his decision on an impermissible consideration . . .") (emphasis in original). That was more than enough to satisfy the notice pleading standard of Rule 8(a)(2) — a conclusion further supported by the official forms appended to the Federal Rules.

3. Sorema nonetheless argues that Mr. Swierkiewicz resigned his job, Resp. Br. at 28-29 and 41. There is, however, no basis in the complaint for that argument. It avers that Mr. Chavel gave Mr. Swierkiewicz the option to resign (without a severance agreement) or be fired. JA 27a at ¶ 33. He refused to resign and, as a result, he was immediately fired by Mr. Chavel. *Id.* at ¶¶ 34-35. Clearly that constituted an adverse employment action under both Title VII and the ADEA. Nor does the decision by the State of New York to deny unemployment compensation benefits to Mr. Swierkiewicz have any preclusive effect on his Title VII and ADEA claims. That decision is referenced by Sorema to support its argument that Mr. Swierkiewicz voluntarily caused his own unemployment. Resp. Br. at 29 n.12. However, in making this argument, Sorema overlooks the provision in New York's unemployment compensation law that specifically provides that "[n]o finding of fact or law contained in a decision rendered pursuant to this article by a referee, the appeal board or a *court* shall preclude the litigation of any issue of fact or law in any subsequent action or proceeding . . ." N.Y.Lab.Law § 623.2 (McKinney 1988) (emphasis added) (with exceptions not relevant here). Since the decision in Mr. Swierkiewicz's unemployment compensation case is not preclusive as a matter of state law, it cannot act as an estoppel to his federal court Title VII and ADEA action. *Kremer v. Chemical Const. Corp.*, 456 U.S. 461, 466 (1982) (federal courts are required "to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the state from which the judgments emerged") (footnote omitted).

See, e.g., Form 5, which approves a complaint that simply states: "Defendant owes plaintiff _____ dollars for goods sold and delivered by plaintiff to defendant between June 1, 1936 and December 1, 1936."[4]

C. Sorema Has No Basis to Discount the Prior Acts of Discrimination It Committed Against Mr. Swierkiewicz

In a final effort to support dismissal of the complaint, Sorema maintains that the acts of discrimination it committed against Mr. Swierkiewicz prior to his firing are time-barred and, therefore, legally irrelevant. Sorema is mistaken. Prior acts of discrimination against a plaintiff can be "quite probative" of the at-issue discrimination claim even if those prior acts are time-barred. *Bazemore v. Friday*, 478 U.S. 385, 402 n.13 (1986). That is because these acts "may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue." *United Airlines, Inc. v. Evans*, 431 U.S. 553, 558 (1977). Indeed, although ignored by Sorema, in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the Court specifically held that an employer's "treatment of [the plaintiff] during his prior term of

4. Despite the conclusory allegations sanctioned by the official forms, *amicus curiae* the Center for Individual Freedom speculates that allowing conclusory allegations of discrimination will render Rule 12(b)(6) "a nullity" in the employment context. Br. at 2 and 5. That is a mistaken view. As in other contexts, it is conceivable that an employment discrimination complaint may be so deficient as to fail to state a claim upon which relief can be granted. For example, an action under the Americans With Disabilities Act, 42 U.S.C. §12101 *et seq.* may be dismissed where the plaintiff alleges she is not disabled and thus not entitled to relief, *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999). Similarily, a Title VII national origin action may be dismissed where the plaintiff pleads the statue of limitations has run on his case, *Delaware State College v. Ricks*, 449 U.S. 250 (1980). Likewise, an ADEA action may be dismissed where the plaintiff pleads he is not yet forty years old. *See* 29 U.S.C. § 631(a) ("the prohibitions in [the ADEA] shall be limited to individuals who are at least 40 years of age"). There doubtless are other examples where, in effect, a plaintiff can plead him or herself out of court. But these are rare cases. *See, e.g.*, 5A Charles Alan Wright and Arthur R. Miller, *Federal Practice & Procedure*, § 1357 at 344 (2d ed. 1990) ("As a practical matter, a dismissal under Rule 12(b)(6) is likely to be granted only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief") (footnote omitted). And this, we submit, is not one of them.

employment" was relevant to determine whether his subsequent failure to rehire claim had merit. *Id.* at 558.[5]

The Court's statement in *McDonnell Douglas* is particularly apt here since the decision-maker, Mr. Chavel, not only was responsible for firing Mr. Swierkiewicz, he was also responsible for discriminatorily demoting him two years earlier (JA 25a at ¶¶ 19-20); telling him the demotion was needed to "energize" the underwriting department — a comment "clearly implying that plaintiff was too old for the job" (JA 25a at ¶ 23); hiring and promoting non-protected class members to jobs for which Mr. Swierkiewicz was qualified (JA 25a-26a at ¶¶ 24-27); and subjecting him to two years of continuous discrimination following his demotion. JA 26a at ¶¶ 29-31. Since he was the "same actor" in regard to all these actions, Mr. Chavel's conduct in the two year period preceding Mr. Swierkiewicz's discharge is "quite probative" of the discharge claims at issue in this suit. *Bazemore*, 478 U.S. at 402 n.13; *accord Andrews v. City of Philadelphia*, 895 F.2d 1469, 1484 (3d Cir. 1990) ("A play cannot be understood on the basis of

5. Nearly every court that has subsequently considered the issue, including the Second Circuit, has similarly held that evidence of prior discrimination against the plaintiff "cannot be ignored." *Schwapp v. Town of Avon*, 118 F.3d 106, 112 (2d Cir. 1997) (time-barred evidence of discrimination against other minorities that occurred before the plaintiff was even hired held admissible). *See also Malarkey v. Texaco, Inc.*, 983 F.2d 1204, 1210 (2d Cir. 1993) (evidence spanning 20 years held admissible in plaintiff's sex and age discrimination suit); *Stewart v. Rutgers, The State University*, 120 F.3d 426, 433 (3d Cir. 1997) (time-barred events held relevant to plaintiff's claim of tenure discrimination); *EEOC v. Manville Sales Corp.*, 27 F.3d 1089, 1093-1095 (5th Cir. 1994) (ageist comments spanning a four year period held admissible in an ADEA discharge case), *cert. denied*, 513 U.S. 1190 (1995); and *Allen v. County of Montgomery*, 788 F.2d 1485, 1488 (11th Cir. 1986) (evidence of time-barred acts of discrimination against plaintiff that occurred prior to her at-issue demotion held relevant).

some of its scenes but only on its entire performance, and similarly, a discrimination analysis must concentrate not on individual incidents, but on the overall scenario").[6]

6. Three final comments are warranted to respond to several other points raised by Sorema. First, contrary to Sorema's representation, Resp. Br. at 19, Mr. Swierkiewicz did not elect to proceed with a circumstantial case of discrimination under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). That decision need not be made until the close of trial since, until at least discovery has been completed, a knowing decision cannot be made whether to proceed under a "mixed motives" or circumstantial case of discrimination. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 247 n.12 (1989); *id.* at 278 (O'Connor, J., concurring). Second, neither Mr. Chavel's age (allegedly the same as Mr. Swierkiewicz's) nor his alleged hiring of Mr. Swierkiewicz in 1989 (another "fact" no where to be found in the record) acts as a bar to suit as Sorema suggests. Resp. Br. at 43. Quite the contrary: the issue here is whether Sorema terminated Mr. Swierkiewicz in 1997 on account of his national origin and age — an issue that specifically addresses Mr. Chavel's conduct and actions from 1995 when he demoted Mr. Swierkiewicz to and through the following two years of discrimination leading to his termination. Ultimately, that issue and the weight, if any, to be given to Mr. Chavel's age and his alleged hiring of Mr. Swierkiewicz should be decided at trial by a jury. *Williams v. Vitro Servs. Corp.*, 144 F.3d 1438, 1443 (11th Cir. 1998), and not on the basis of Sorema's factually unsupported motion to dismiss. Third, the determination by the EEOC, referenced by Sorema, Resp. Br. at 32, but nowhere to be found in the record, is legally irrelevant. Title VII and ADEA actions are *de novo* proceedings that may be pursued regardless of whether or not the EEOC has found cause to believe that discrimination occurred. *McDonnell Douglas*, 411 U.S. at 798-799 (Title VII), *Astoria Fed. Sav. and Loan Ass'n v. Solimino*, 501 U.S. 104, 112-113 (1991) (ADEA).

CONCLUSION

For all the reasons stated, the judgment of the Second Circuit should be reversed.

Respectfully submitted,

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